

out before, that does cause some degree of discomfort. Because, of course, when you're talking about capital punishment, it is the ultimate sanction, and sort of getting it right in most cases isn't good enough. I agree with that.

Senator FEINGOLD. Thank you, Mr. Chairman. Thank you, Mr. Roberts.

Chairman HATCH. Thank you.

Senator Schumer, you will be our last questioner.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR  
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank you for holding this hearing. I want to thank Mr. Roberts for returning to the hearing today. I know it wasn't your choice to be scheduled the same day we had hearings for two other controversial nominees, and I for one am sorry you didn't get your own hearing earlier, but I am glad you are here today.

Now, after your hearing, I sent you several written questions. For all intents and purposes, you refused to answer three of them. I know you had your reasons for refusing to answer, but to be frank, I don't find the reasons compelling, I don't find them fair, and I don't find them really in accord with your responsibility to let this Committee know as part of the advise and consent process your views.

The Senate has a duty, as you know, to thoroughly vet individuals nominated to the Federal courts, but that duty is especially sacred when it comes to the most important courts, and there is no question that the D.C. Circuit, the court to which you have been nominated, qualifies on that score. I have called it in the past "the second most important court in the land." I was at the naming of our courthouse for Thurgood Marshall in New York City, and my friends from New York on the Second Circuit took a little umbrage, but it is true. The D.C. Circuit I think is the second most important court in the land.

But when I say we have a sacred duty in this process, I mean it. That is not just verbiage for me. The Founding Fathers worked long and hard to achieve balance in our system of Government. They struggled to ensure that no one branch would dominate the others. And an essential part of that balance is the advise and consent clause. It is true at any time in our history, but it is especially the case in an era when the President seems to have an ideological prism with whom he nominates. Clearly, the nominees that have come from the White House, if you sprinkled them throughout the political spectrum, wouldn't land evenly throughout.

And that is a President's prerogative. I have nothing against the President doing it. But I truly do object to the idea that we shouldn't ask and you shouldn't answer questions, particularly at a time when the President is seeing things through an ideological prism, when he has stated, to his credit, he wants to appoint Justices in the mold of Scalia and Thomas, who are not moderate mainstream judges, but whatever your views of their views, they tend to be way over to the right side, and every one—not every one, but most of their decisions show that.

So I think we have a duty to ask questions, and assuming that the questions are not improper, the nominees have a duty to answer them. I don't think it is enough for a nominee to tell us or for you to tell us you will be fair and impartial. I do not believe it is sufficient to say, "I will follow the law." Every nominee says that.

We have the right to know the responsibility how you will approach the difficult and important legal questions that come before the D.C. Circuit, not to know how you will rule in a specific case but generally your way of thinking.

The law, as you know from your extensive experience as an appellate litigator, is not something that a judge divines or that is handed down from above. Law and truth are not always one and the same. Judges disagree because there is a degree of subjectivity of the law. You can't avoid it. If there weren't, there wouldn't be dissenting opinions. There wouldn't be legal debate. We could put black robes on computers and put them on the bench instead of going through this process.

So I think the questions that I asked you were fair and proper. Now, you disagree and that is your right, but I have to tell you that you will have a hard time winning my vote if you don't answer these questions. I don't think it is the way a nominee should come before this Committee.

So I want to discuss the questions you have refused to answer, and I first want to focus on Question 5 from the written questions I sent you. I asked you to identify three Supreme Court cases of which you are critical, and I asked you to limit your answers to cases that haven't been reversed and that have not been criticized publicly previously by you. In not responding, you cited Lloyd Cutler's remark that, "Candidates should decline to reply when efforts are made to find out how they would decide a particular case." Fair enough. And you relied on Canon 5 of the ABA Model of Judicial Conduct.

But I want to be very clear with you here. I am not trying to make any effort to find out how you would decide a particular case. I agree it would be inappropriate for me to ask you about a particular case. If I were to say what is your view on what Enron did and how you might rule on it, for instance, you should decline. If I ask you what are your views on corporate ethics and what are your views of a certain holding of the Court, that is a different situation altogether. I am not even asking you about a hypothetical case.

So while I think engaging in discussions of hypothetical scenarios are useful in certain circumstances, those questions are closer to the line and I am not willing to pursue them.

The question I have asked is as narrowly drawn as it can be to achieve my goal of learning how you approach the law while protecting you from announcing how you will rule on a given case. And just because I am hardly an expert here, I contacted the Nation's leading legal ethics expert, Stephen Gillers, the Vice Dean at NYU Law School, and asked him to tell us whether there is any ethical problem with a nominee answering the question I posed to you, Question 5. He said, emphatically and unequivocally, that there is no problem.

In fact, Mr. Chairman, I have a letter from Vice Dean Gillers to me on this, and I would ask unanimous consent to submit to the record.

Chairman HATCH. Without objection.

Senator SCHUMER. I don't know if the folks at DOJ showed you the letter that Dean Gillers sent. We tried to contact you and your DOJ handlers yesterday to make sure you knew we would be asking this question. But I hope you will read it now because he makes a compelling argument.

I promise you you will have a full chance to respond to that. But before I do, I would note that other judicial nominees have answered this question. Miguel Estrada clearly did not. But he was the apotheosis of avoiding any questions asked by this Committee. And I hope you won't follow in that direction.

Linda Reade, who is now a judge on the district court, was particularly forthcoming when we considered her the same day we considered Miguel Estrada. And no one has even thought remotely of saying she violated Canon 5.

I have made it my practice to ask the question of people I consider for judgeships in New York. Every one of them has answered the question.

Just recently, Dora Irizarry, the President's most recent nominee in New York, came to meet me, and she answered the question forthrightly, naming and discussing some very recent cases. She wasn't violating Canon 5. That is a ruse. And it was used as a ruse by Miguel Estrada. I hope you won't follow in those footsteps. Let me repeat that.

And just in case people think this issue is partisan, several Republican Senators agree that these questions are proper because they asked them, nearly identical questions of President Clinton's nominees. Again, no one—no one—said there was any violation of the canons.

So, first, let me ask you: Will you reconsider and answer the question? If not, in light of Dean Gillers' letter, in light of the inapplicability of Canon 5, and in light of the answers given by other nominees, in light of the fact that several Republican Senators believe the questions are proper, and in light of the importance of the process in which we are participating, why won't you? And how do you differentiate you from all the others who have been willing to ask or answer this question? And I just hope that you will give us some insight on how you approach questions like this? They are important for me to make up my mind fairly about whether to support you or not.

So now I have spoken for a while. Please answer.

Mr. ROBERTS. Thank you, Senator, and I appreciate the opportunity to address the question again. I want to be responsive, but at the same time, I think it is important that I avoid doing anything that is going to be harmful to the Federal courts as an institution.

I did get a copy of Professor Gillers' letter just before the start of the hearing and looked at it, and I think it is important you said that other Senators have asked these kinds of questions. One of the things I did in preparing for this hearing was go back and look at Justice Ginsburg's hearings. And she on numerous occasions said

it would not be proper for her to comment on particular Supreme Court precedents. She was asked by Senators on both sides of the aisle, and she said she was religiously adhering to that guidance because she thought it would be harmful to the Supreme Court for nominees to answer those kinds of questions.

Now, let me just explain briefly why I answered—

Senator SCHUMER. Give me an example of one of the questions that she refused to answer. Are they similar to these or were they more specific?

Mr. ROBERTS. They were more specific in that they identified particular cases.

Senator SCHUMER. Exactly.

Mr. ROBERTS. I don't see a principled distinction. It seemed to me if you are able to say I disagree with this binding Supreme Court precedent and here is why, I don't see how that would prevent anybody from then saying, all right, well, what about this one? And you are going to have your list of ten cases you want to know about, and Chairman Hatch is going to have his list of ten cases. And the reason Justice Ginsburg gave for—I don't know about technically whether it violates an ethical standard or not, but the reason that she thought it was inappropriate to answer that question is because it is an effort to obtain a forecast or a hint about how a judge will rule on a particular case.

If I were to tell you here's a case I disagree with, the *Lopez* case, I think that's wrong, that gives you a hint of forecast about how I would apply the Commerce Clause in a particular case related to *Lopez*. And another reason, it certainly raises very serious appearance problems. Let's say I tell you I disagree with the Smith case and we get into a discussion and here's why the Smith case was wrongly decided, and I'm confirmed and a case comes before me and the lawyer's saying this is governed by the Smith case, you should apply that, and I don't. That lawyer—that party is going to feel like he got a raw deal, and it's because I disagreed with the Smith case, because, look, at the confirmation hearing they asked you about that and you said you disagreed with it.

Certainly—

Senator SCHUMER. How is this different—let me just interrupt you. How is this different than us examining the precedents of judges who have written, you know, pages and pages of cases? And how does that—is that any different—

Mr. ROBERTS. Yes.

Senator SCHUMER. —in terms of jeopardizing their futures and their future impartiality than your asking a case that you didn't happen—answering the same situation of cases you didn't judge? You are making this an absurd process, sir, when you are saying that you can't answer even broad questions about specific jurisprudence, when you can't say how you feel about previous court cases. I am not asking you a specific fact situation. That is what Gillers says Canon 5 is all about. And when you say you can't answer any of those, although countless judges have through the decades, I think you are making—you are rendering the advise and consent process useless from my point of view.

Let me ask you this: Did they ask you any of these questions at the White House?

Mr. ROBERTS. No.

Senator SCHUMER. They didn't ask you how you felt on any issue at all?

Mr. ROBERTS. No, and they certainly didn't ask about any particular cases. I—

Senator SCHUMER. How about the types of questions that you refused to answer here, they didn't ask you those?

Mr. ROBERTS. No, Senator. I'm trying to adhere to the line that I understand Justice Ginsburg—and she drew a distinction between cases that she had decided. She thought that was an appropriate line of inquiry. But when asked about particular Supreme Court cases, she said it would not be proper for her to answer those.

Now, in Professor Gillers' letter, he talks about the Republican Party case. With respect, a very different question of whether—that was a First Amendment case. I'm not saying, you know, just because it wouldn't violate—or it would violate the First Amendment to restrict people from talking means it's a good idea. And, second of all, it involved the election of judges in State campaigns, and I certainly hope that's not the type of process. The Framers in the Constitution didn't provide for elected judges, and I don't want to get into that type of process.

Senator SCHUMER. The Framers, let me ask, when they had John Rutledge, the first nominee before the Senate—and I believe it was 12 of the 22 Senators were actual Framers—they talked about—you know, they talked about his views on the Jay Treaty. They clearly intended specific issues and specific cases to be discussed.

Mr. ROBERTS. Well, Senator, all I can say is that my understanding of the practices of the Committee—and I'm happy to talk more generally. You said I have declined to answer broad questions. I don't think that's accurate. I've answered broad questions about judicial philosophy, about my approach to judging. It is when you get to particular binding Supreme Court precedents. I will be bound, if I am confirmed, to apply those precedents whether I agree with them or not. And I think it would distort the process for nominees to be subject to questioning about those precedents. As a lawyer practicing—

Senator SCHUMER. Let me just—go ahead, please.

Mr. ROBERTS. I was just going to say, as a lawyer practicing before the court, I look at precedents that have been decided. But if it's now the case that judges are going to be quizzed about their personal views about particular precedents, I'll have to start researching the confirmation hearings of the judges on the panel.

Senator SCHUMER. Let me ask you one more question. Did the people you worked with in the Justice Department tell you not to answer any of these questions? Did you discuss it with them? Because here is what I worry about. I think you are a fine guy. I mean, I have seen your record. My guess is it is possible that because Miguel Estrada didn't answer those questions, they didn't want you to.

Mr. ROBERTS. Oh, well—

Senator SCHUMER. That is my guess. Now, you don't have to speculate on that, but I do want to ask you: Did you discuss with

them whether you should answer the specific questions I asked you? You can answer that yes or no.

Mr. ROBERTS. Well, I would like to do a little more than yes or on. The answer is I wrote the answers to the questions—

Senator SCHUMER. I understand that, but that was not my question.

Mr. ROBERTS. —and I sent them—the second part of my answer is that I sent those to the Justice Department for their review before they were—before they were finalized, before I finalized them. I don't recall them making changes in any of these.

Senator SCHUMER. Did you discuss it with them before you wrote the answers?

Mr. ROBERTS. I asked—I did ask if they had access to prior hearing transcripts so I could see how other judges had answered them, and I got a lot of different transcripts that I went through.

Senator SCHUMER. So you did discuss some aspects of this with them.

Mr. ROBERTS. To that extent.

Senator SCHUMER. Okay. That is fair enough. I mean, that is not dispositive to me, but I think we ought to know because I think knowing who you are and knowing some people who know you well—and, again, I think you are a fine person. I think something is going on here when you don't answer this question, which so many others have done. But let me go on.

You said you didn't want to discuss philosophies, so let's move on to Question 3. You were willing to discuss philosophies. I asked you in Question 3—here is my question to you: What two Supreme Court Justices do you believe have the most divergent judicial philosophies? It is a discussion about philosophy. How would you characterize the judicial philosophies or each—these are my questions, I am just quoting—e.g., strict constructionist, originalist?

Of the two you name in terms of judicial philosophy, which Justice do you anticipate you will more closely approximate and why? You responded by saying that you “do not believe that a nominee should, as part of the confirmation process, compare and critique the judicial philosophies of sitting Justices.”

You also expressed concern that answering the question would violate your ethical obligations to clients with matters before the court. I have to say, again, I am somewhat baffled by your reasons for not answering. I am not asking you who is the worst Supreme Court Justice. I am not asking you to insult or criticize any of them. There is a rich tradition of Supreme Court litigators in debate, in commentary, discussing not only the jurisprudence of but even the personalities—I didn't ask you that—of sitting Supreme Court Justices before whom they practice. They don't see this as a problem, and I am wondering why you do, and even if you do. You are being asked by this Committee—you are being nominated to a very important position, and it seems to me, even if you wouldn't want to answer the question because maybe one of your clients might take some umbrage in one way or another—I don't know; I don't know your clients—that you should, anyway. But this was a question about philosophy, and you did actually, in response to Senator Durbin's written questions, you discussed at length the ju-

dicial philosophies of Justices Scalia and Thomas. And for your purposes, that was Question 10 answered on page 10.

So why did you refuse to answer my question?

Mr. ROBERTS. Well, Senator Durbin's question specifically asked what is Justice Scalia's originalist approach, what is Justice Thomas', and since they had given addresses and written articles on that particular point, I was able to draw from those and answer as best as I could what they had said their approach and philosophy was.

I guess I did think it was inappropriate for someone who is going to be sitting on a circuit court to criticize the judicial philosophy and approach of—

Senator SCHUMER. I didn't ask you to criticize it—

Mr. ROBERTS. —the Justices.

Senator SCHUMER. —any more than it is called criticism—

Mr. ROBERTS. Well, you said who has—the question—

Senator SCHUMER. The most divergent. That is not—that is a neutral word.

Mr. ROBERTS. Well—

Senator SCHUMER. Some people would like divergent. In fact, I think a Supreme Court would be best if it had one Brennan and one Scalia, not five of either.

Mr. ROBERTS. I think it—I guess maybe part of the reluctance to answer is that I'm not sure that I could give an intelligent answer because I do think the philosophies of the Justices are pretty hard to pin down. When they're articulating them in articles and addresses, you can look at it and see if you think they're living up to those standards. But to go back and analyze all of the cases and see was this Justice adopting this philosophy in this case or this one that philosophy in another case, I guess I just didn't feel capable of doing that because I think certainly the case probably for all nine of them would tell you—and I think it's true to a large extent—they begin with the case. They don't begin with the philosophy. And in some cases, looking at the case drives them to a particular result, and you can look, easily see decisions where you think this is not an originalist approach, and yet that Justice might describe himself in that particular way.

And so when you get down to the way the question was presented of who has the most divergent, I just didn't see how I could—

Senator SCHUMER. Okay. That is not how you answered the question when I asked you. You said it was—and I quoted your answer a minute ago, but you said it was—you didn't think you should comment on their philosophies, not that you couldn't answer the question. And then you did talk about philosophies with Senator Durbin—

Mr. ROBERTS. And I'm happy—well, and he asked what the—those two Justices had written about their philosophies.

Senator SCHUMER. And I don't feel left out. He's my roommate. I mean, I just think that it's not—there is not a consistency here.

Mr. ROBERTS. I'm happy to talk, and I have discussed at length with some of the other questioners my approach to judicial philosophy and the fact—and this may reflect—my answer may reflect this more than anything else, that I don't feel that I bring a coherent, universal approach that applies across the board to all the pro-

visions of the Constitution. Again, I don't know if you regard that as a flaw or as a positive thing, but that is the case.

Senator SCHUMER. I don't think that is relevant to whether you can answer my question or not. Most people probably don't have a divergent thing.

Chairman HATCH. Senator—

Senator SCHUMER. I have one more question, Mr. Chairman.

Chairman HATCH. If you will wind up, because I have given you double the time.

Senator SCHUMER. You have, which I appreciate, although this is an important—

Chairman HATCH. One more question, and then I would like to finish.

Senator SCHUMER. This is an important nomination, and we have been here for 3 hours, I guess, 2 and a half. I don't think it is too much to ask.

Chairman HATCH. No, you can go ahead.

Senator SCHUMER. Thank you.

Chairman HATCH. But I would like to end with this last question.

Senator SCHUMER. Okay. One of my questions that you did answer, which was Question 4 on mine, was a question regarding how you define judicial activism. You also at my request named one case, albeit a California State case from 1899, of judicial activism.

So I want to ask how your definition applies to some more recent and higher profile matters. Was *Brown v. Board* an instance of judicial activism?

Mr. ROBERTS. The Court in that case, of course, overruled a prior decision. I don't think that constitutes judicial activism because obviously if the decision is wrong, it should be overruled. That's not activism. That's applying the law correctly. So if that's the aspect of it, the overruling, I don't think I would characterize it in that way.

The Court had a concrete—my definition of judicial activism is when the Court moves beyond the role of deciding a concrete case or controversy and begins to either legislate or execute the laws rather than decide the case and say what the law is. And I don't see that there's anything about *Brown*, obviously, a momentous decision with dramatic impact on society, but what the Court was doing in that case was deciding and telling what the law was, that the Equal Protection Clause properly interpreted does not mean you can have separate but equal, because that is inherently unequal. So I—that would not—

Senator SCHUMER. How about *Miranda*, was that—*Miranda v. Arizona*, was that—

Mr. ROBERTS. Well, we have some guidance from the Supreme Court in the *Dickerson* case recently in which the Court explained that the rules it articulated in that case were constitutionally based. If that's correct—and the Supreme Court has said it, so as a matter of law it is correct—that is an interpretation, an application of the Constitution. That, again, strikes me as being within *Marbury v. Madison* framework of saying what the law is.

I guess what *Dickerson* was about is really whether *Miranda* was an instance of improper judicial activism or not. If the Court had



determined that was not constitutionally based, then I think the argument would have been the other way.

Senator SCHUMER. All right. How about *Roe v. Wade*?

Mr. ROBERTS. *Roe v. Wade* is an interpretation of the Court's prior precedents. You can read the opinion beginning not just with *Griswold*, which is the case everybody begins with, but going even further back in other areas involving the right to privacy, *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, cases involving education. And what the Court explained in that case was the basis for the recognition of that right.

Now, that case and these others—certainly *Brown* was subjected to criticism at the time as an example of judicial activism. *Miranda* was as well. But, again, all I can do as a nominee is look to the rationale that the Supreme Court has articulated.

Senator SCHUMER. So you don't think *Roe v. Wade* was judicial activism as you defined it in your—

Mr. ROBERTS. The Court explained in its opinion the legal basis, and because the Court has done that, I don't think it's appropriate for me to criticize it as judicial activism. The dissent certainly thought it was and explained why, but the Court has explained what it saw as the constitutional basis for its decision.

My definition of judicial activism is when the Court departs from applying the rule of law and undertakes legislative or executive decisions. Now—

Senator SCHUMER. Well, can you—since you seem to make the argument if the Court rules that it is not judicial activism, that would not be true of many people who write and comment and everything else, can you give me a Supreme Court case that you think was judicial activism?

Mr. ROBERTS. Senator, again, you are sort of getting back into the area where following Justice Ginsburg's—

Senator SCHUMER. Getting back into the area of a hard question, that is all.

Mr. ROBERTS. No. With respect, Senator, you're getting back in the area of asking me to criticize particular Supreme Court precedents. Justice Ginsburg thought that was inappropriate because it would be harmful to the Supreme Court. I think it's inappropriate because it would be harmful to the independence and integrity of the Federal judiciary. The reason I think key to the independence and strength of the Federal judiciary is that judges come to the cases before them, unencumbered by prior commitments, beyond the commitment to apply the rule of law and the oath that they take. I think that is essential. And if you get into the business where hints, forecasts are being required of a nominee because you need to know what he thinks about this case or that case, that will be very harmful to the judiciary.

Senator SCHUMER. Then you are getting us into the absurd position that we cannot ask questions about just about anything that will matter once you get on the court.

Mr. ROBERTS. No. With respect—

Senator SCHUMER. Just one final one, and then I will let you—what about *Morrison*, you know, the VAWA case, was that judicial activism?

Mr. ROBERTS. Again, Senator, you're asking me—the Court articulated the basis for its decision in the rule of law, and I don't think it's appropriate to criticize that by characterizing it in a particular way. The legal basis for the decision—

Senator SCHUMER. So are you saying that the four Justices who dissented in *Morrison* were—I mean, I don't even get where this goes, that they were being inappropriate?

Mr. ROBERTS. I guess where it goes, Senator, is I will be, if I'm confirmed, called upon to apply the *Morrison* case, among others. And I think it is a distortion—

Senator SCHUMER. The dissent was strong. I mean, it was—

Mr. ROBERTS. I think there's a distortion of the process if I have been compelled to give personal views about the propriety of that decision.

Senator SCHUMER. Why is that? Could you just explain that to me again? I don't understand. I think—

Mr. ROBERTS. Sure—

Senator SCHUMER. —it far more damages the process when you don't. But tell me why. Is this because people will think you are unfair or people will think you are biased?

Mr. ROBERTS. If you are a litigant—let's just say that, you know, the Smith case, and you want to know my views on that, and I tell you personal views on it, yes, I will be bound to apply it, but, by the way, I think it was a horrible decision, I think it was wrongly decided, I think it was judicially active, or whatever. And then I am confirmed and a case comes along and one of the litigants says this case is controlled by the Smith case or the Smith case should be extended to cover this case, and I rule no, I think that party will walk away saying, well, that's because he disagrees with the Smith case.

Chairman HATCH. They might move to recuse you to begin with, just because you had made some comment.

Senator SCHUMER. Well, let me ask you this: Then why doesn't every person who is involved in federalism or violence against women who goes before the Court think that the four Justices who dissented are biased and the process is damaged? I mean, this is an absurd argument, in all due respect. Justices on the bench dissent. They criticize opinions that, by definition they are in dissent, that become part of the law. And that would mean on a whole variety of different instances every one of the nine Supreme Court Justices would be held not to be fair, not to be unbiased. People have their opinions. We all know that.

So the first time you dissent, if you get to the D.C. Circuit, you will be—you are saying that on that particular area of law, anyone who comes before you will think that you are not going to be fair to them.

Mr. ROBERTS. I think there is a difference between the exercise of the judicial function. And again I am adhering to the line that Justice Ginsburg applied—I don't think it was absurd when she said it—and that is that it does cast a cloud of unfairness if, as part of the confirmation process—and that is what is most troubling, Senator. It is not part of the judicial process where you are deciding a particular case and stating your reasons in a dissent. It is part of the confirmation process. So the concern is that you are

giving commitments, forecasts, hints, even at the extreme, bargains, for confirmation and that carries forward.

Senator SCHUMER. One final question. Is it better or worse if, in fact, you have opinions, which clearly you must, but these opinions aren't revealed? How does it make it any different?

Mr. ROBERTS. I don't know if it is better or worse.

Senator SCHUMER. So you are saying that people will think you are biased if you reveal the opinion. Won't people think you are biased if you have an opinion? And that again gets to the absurd argument that every one of us then who might be a judge is biased because we all have opinions.

Mr. ROBERTS. The problem, Senator, is that, if confirmed as a judge, I will be called upon to apply the rule of law. And, of course, I have opinions about particular decisions. Probably every decision I read, I have an opinion whether I think it is good, bad or—

Senator SCHUMER. You are saying when you offer those opinions, people will think you are biased here, right here.

Mr. ROBERTS. When you offer those opinions, it will distort the process. It is either an effort to obtain a prior commitment for someone as a nominee about how they will decide the case, and I think that is very inappropriate, or it will have a distorted effect on how that judge will appear to parties appearing before him.

I think it will distort the process because people will now go back to Committee hearing transcripts to find out what judges thought about precedents that they are litigating about rather than the rule of law as established in those precedents.

And it also forces the nominee to make a decision not in the judicial context in a manner that could be premature. I think of the *Dickerson* case a couple of years ago. The Chief Justice issued the opinion saying that *Miranda* is constitutionally based. I don't know if that is what he would have said if he were forced at his nomination to say "do you think *Miranda* is constitutionally based?" But when he got to the decisional process and saw the briefs and the arguments and the cases, he was able to make a decision in that instance.

Senator SCHUMER. So your argument now has sort of shifted. Instead of worrying that other people will think you are biased, it will lock you into thinking, or at least pre-dispose you to thinking a different way about the case because you have told us something that you think.

Mr. ROBERTS. The argument hasn't shifted. There are a number of reasons why my answering such questions, I think, is inappropriate. The last one was one that Justice Kennedy recently discussed in his address at the University of Virginia Law School.

He says because as a judge when you are called upon to make a decision, you go through an entirely different process. I think that is one reason nominees should be put in that position.

The other reason, because it is an effort to obtain a forecast or a hint about how they are going to rule, and that, President Lincoln said long ago, is not something nominees should answer. And that is a line, as I said, that Justice Ginsburg followed. And another reason is, as I said, it distorts the process.

Senator SCHUMER. So every nominee who has been here before us and answered questions more directly and forthrightly than you

on these things has contributed to distorting the process, including some of your potential future colleagues who will sit on the bench in the D.C. Circuit, including some Supreme Court nominees?

Chairman HATCH. Senator, with all due respect, I don't know anybody who has answered these questions that has come before the Committee in 27 years. What you are asking is way beyond—I mean, you have a right to ask whatever you want to.

Senator SCHUMER. Your own colleagues, sir, asked those same questions of Paez, Berzon and others.

Chairman HATCH. And I made the comment to my colleagues that any Senator on this Committee can ask any question he wants, no matter how stupid it is.

Now, to make a long story short, I have given you more time than anybody else on this Committee and frankly I don't think we are getting anywhere. I don't blame him. I would find fault if he did answer those questions, and I think so would a whole bunch of others.

I found fault with people on our side who tried to ask the same type of questions. In fact, I criticized one Senator, in particular, and it was embarrassing to do it. I didn't like doing it, but I just felt it was way out of line.

Now, look, you have a right to ask these questions. He has given, I think, very articulate answers that I would respect in anybody because he is nominated for one of the most important courts in the country. And I don't blame any nominee that comes before this Committee for not wanting to put themselves in a position where somebody can misconstrue what they have said here in Committee, when they have to make decisions later.

I don't know anybody, including Democrat nominees for the Supreme Court and other Democrat nominees, who have had to answer these types of questions other than the way he has answered them, and I think that he has answered them fairly.

But, Senator, you have now had 35 minutes and I think you are beating it to death, is my point.

Senator SCHUMER. May I say this, Mr. Chairman?

Chairman HATCH. Yes. I respect you and I don't want to mischaracterize, but I think you are beating it to death.

Senator SCHUMER. What I would say is this: If you are correct, then we ought not have these hearings.

Chairman HATCH. Heavens, no. There have been all kinds of revelations in this—

Senator SCHUMER. We ought to find out the resumes of each person. We ought to then have some detectives and see if they have broken little rules here and there, but we ought not have these hearings because—

Chairman HATCH. Senator, if you are right, then we ought to get the secret police to examine every aspect of everybody's lives that come before the Committee.

Senator SCHUMER. No, no, just the opposite, just the opposite.

Chairman HATCH. That is what you seem to be saying.

Senator SCHUMER. Orrin, what I am saying is those things shouldn't matter, and they have mattered in the past because they were a kabuki game for what people really wanted to know, which is the questions that I am asking. And I would just say to you—

Chairman HATCH. Senator—

Senator SCHUMER. I would like to finish.

Chairman HATCH. Go ahead.

Senator SCHUMER. I would like to say to you that if refusal to answer questions like this will become the norm, then we have done real damage to the advise and consent process and to the Constitution. And I know you disagree.

Chairman HATCH. I do violently disagree.

Senator SCHUMER. But that is the bottom line.

Mr. Roberts, I just want to conclude. I think you are a fine person. I think you are a good lawyer, an excellent lawyer, far better than I would ever be. But I guess my hope is that you are in a difficult position right here, given the circumstances as things have occurred, because I think you should have been more direct in answer to these questions for the good of the process.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Schumer.

I think Senator Schumer has the right to say whatever he says and ask any questions he wants. And you have certainly the right to answer them the way you want to, as well, and I think you have answered them very appropriately. In fact, you have gone beyond the pale.

Now, let me just also say that I would like to note that we on the Republican side did not receive a copy of Professor Gillers' letter until 9:30 this morning. So we have only just read over it, and very cursorily at that. But let me say that I don't personally—and I don't think anybody on our side—consider Professor Gillers the definitive word on this, especially when you consider the nominees whom this Committee has confirmed who refused to answer similar questions.

Senator SCHUMER. Mr. Chairman, we gave you that letter.

Chairman HATCH. I am not griping about it. I am just saying we didn't have enough time to really look at it. But I certainly would not call him the definitive last word. I have seen him give letters; whatever you want, he gives them to you. I am not talking about you, in particular, but on the Democrat side.

Senator SCHUMER. I just want the record to show that the minority was given this letter on the last day we voted on the Roberts nomination, which was about 2 months ago.

Chairman HATCH. Not that I know of. My understanding is that Mr. Roberts got this letter via voice mail, left for you around 8:00 p.m. last night.

Now, let me give you some examples. I think it is important to set this record straight.

In 1967, during his confirmation hearing for the Supreme Court, Justice Thurgood Marshall responded to a question about the Fifth Amendment by stating, "I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed, sit on the Court and when a Fifth Amendment case comes up, I will have to disqualify myself."

Now, you have said it more articulately than that. But, in essence, that is what your answers have been, at least some of them.

During Justice Sandra Day O'Connor's confirmation hearing, the Senator from Massachusetts, Senator Kennedy, the former Chair-

man of the Judiciary Committee, defended her refusal to discuss her views on abortion. He said, quote, "It is offensive"—this is Senator Kennedy—"for a Republican nominee"—he said "It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential Justice must pass the litmus test of any single-issue interest group," unquote. Now, that is Senator Kennedy.

Likewise, Justice John Paul Stevens testified during his confirmation hearing, quote, "I really don't think I should discuss this subject generally, Senator. I don't mean to be unresponsive, but in all candor I must say that there have been many times in my experience in the last 5 years where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of decisions. And I think that if I were to make comments that were not carefully thought through, they might be given significance they really did not merit," unquote.

Pretty much what you have said, because until you get the briefs and the arguments and you see everything involved, it is pretty hard to give opinions in advance, no matter how good you are, and you are good. And I think anybody with brains would say you are one of the best people that has ever come before this Committee.

Justice Ruth Bader Ginsburg also declined to answer certain questions, stating—I am just giving you a few illustrations; I could give you hundreds of them—quote, "Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously."

I would have trouble with you if you answered some of those questions.

In addition, Justice Ginsburg just last year said in dissent in the case of *Republican Party of Minnesota v. White*, which is cited by Professor Gillers, by the way, quote, "In the context of the Federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be"—quote within a quote—"of interest"—unquote within a quote—"to the President and the Senate. But in accord with a longstanding norm, every member of this Court declined to furnish such information to the Senate, and presumably to the President as well," precisely what you have said here.

Now, all of these questions have one thing in common. They are designed to force the nominee to disclose his personal views on hot-button social or other issues. This is inappropriate, in my view, at least, and I think has always been, in this Committee's view, as evidenced by Senator Kennedy's remarks in protecting Sandra Day O'Connor, a Republican nominee, something for which he deserves credit.

I think it is inappropriate because a good judge will follow the law, regardless of his or her personal views. And you have made that very clear throughout your testimony not only today, but in the 12-hour marathon we had before, where I admit you weren't asked an awful lot of questions. You were asked plenty, but not as

much as our colleagues wanted. That is why we are having this second hearing.

Discussion of a nominee's personal views, I think, can lead to an appearance of bias and I think that is improper. It is just another attempt in my book to change the ground rules of the confirmation process.

Now, look, I have a lot of respect for Senator Schumer. We are good friends. He is a smart lawyer. He is very sincere. He comes to these meetings and he asks questions. Most of them, I believe, are very intelligent questions. Some, I totally disagree with. Some, I think, are dumb-ass questions, between you and me. I am not kidding you.

[Laughter.]

Chairman HATCH. I mean, as much as I love and respect you, I just think that is true.

Senator SCHUMER. Would the Senator like to revise and extend his remarks?

Chairman HATCH. No. I am going to keep it exactly the way it is. I mean, I hate to say it. I feel badly saying it, between you and me, but I do know dumb-ass questions when I see dumb-ass questions.

[Laughter.]

Chairman HATCH. I do want to note that Professor Gillers' letter is dated February 26 of this year. So I was wrong in my comments earlier as well, so I want to make that point.

Senator SCHUMER. I would say you were acting in a DA way by doing that.

Chairman HATCH. Senator Schumer and I are going to be friends, no matter what, because I am going to force him to like me, I just want you to know.

Senator SCHUMER. You have done a very good job this morning, Mr. Chairman.

Chairman HATCH. Just like he tried to force you to screw up here and make a terrible mistake.

I do care for him and I care for everybody on this Committee. I have to admit I get very disturbed by some of the things that go on here. This Committee is one of the most partisan committees, one of the most partisan institutions I have ever belonged to. I would like it to be less partisan; I would like it to work. I would like us to be fair to witnesses.

Admittedly, some on my side were unfair, not many, but some were unfair from time to time. I didn't like it any better then than I do now and I am doing my best to do something about it.

Let me just say, in conclusion on this hearing, I have seen an awful lot of witnesses who have been nominees for Federal judgeships come before this Committee and I venture to say that I am not sure I have ever seen one who has been any better than you.

I understand why you are held in such high esteem by I think every Justice on the Supreme Court. I have chatted with a number of them. Some have ventured to say to me that you are one of the two top appellate advocates in the country. That is high praise indeed. I have had other judges say what a fine person you are and what a terrific lawyer you are.

I expect you, when you get on the Circuit Court of Appeals for the District of Columbia—and I think you will have bipartisan support to get there; I would hope so. But I expect you to become one of the premiere judges in this country. You have what it takes to do it. You have tremendous capacity and ability, and anybody with any brains can recognize it.

Anybody with any sense of fairness is going to vote for you, and I intend to see that votes occur in accordance with our agreement. So we will put you on the Committee markup tomorrow morning. You will not come up in Committee tomorrow because I have agreed to at least put you over until the next Thursday, and we will vote on you Thursday from tomorrow.

Then, assuming you come out of the Committee—and I think that is a given; you had bipartisan support last time and I expect it to even increase—then within a week, according to my friends on the other side, you should have a vote on the floor.

I want to accommodate my friends as much as I can, and I want to compliment them for agreeing to this and agreeing to Justice Cook's vote up and down on the floor and for agreeing to Jeffrey Sutton's vote. It wasn't easy for some on the other side who really feel very deeply about these issues, as does my friend from New York. But I am grateful to them.

And I am grateful to you for the patience that you have had during this hearing and during the other hearing, because you sat there for 12 solid hours. Frankly, I have to just show tremendous respect for you. You deserve it, and I hope that we can have this all work out just the way I have announced it, the way we have agreed.

I think the Circuit Court of Appeals for the District of Columbia, and perhaps many, many other courts in this country will benefit from having a person of your stature and your ability on the court.

So with that, we are grateful that we have had this second hearing. I want you to get your written answers back as soon as you possibly can. We expect all questions to be in by Friday. We would love you to have them back as soon as you can because next Thursday you are going to be voted upon and I would like my colleagues to have the benefit of having your answers to their questions.

With that, we are going to allow you and your family to go. We really appreciate your being here for so long and your patience in being before the Committee.

Mr. ROBERTS. Thank you very much, Mr. Chairman.

Chairman HATCH. Thank you.

Now, I am supposed to be at another meeting at 12:30, but I think what we will do is try to conclude with the other three witnesses. If you will all come forward, we will conclude.

If you three will raise your hands, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. CAMPBELL. I do.

Mr. HICKS. Yes.

Mr. MOSCHELLA. I do.

Chairman HATCH. We are sorry you had to wait until now, but as you can see, we go by the various courts involved. We are grate-



ful to have all three of you here. We are grateful to have your families here.

I think what we will do is we will start with you, Mr. Campbell. Do you care to make any statement? We would like you to introduce your family. I know a lot about you. I had a very high regard for you even before you got here. The distinguished Senators from Arizona have certainly spoken very highly of you, as well. Senator Kyl is a strong supporter and I am sure Senator McCain is as well.

Would you like to introduce your family or make any statement you would care to make?

**STATEMENT OF DAVID G. CAMPBELL, NOMINEE TO BE  
DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA**

Mr. CAMPBELL. I have no opening statement, Mr. Chairman, but I would extend my thanks to you for holding the hearing today. I would like to introduce my wife, Stacey Sweet Campbell, of 25 years, who is here.

Chairman HATCH. If you would stand?

[Ms. Campbell stood.]

Mr. CAMPBELL. My daughter, Jenny, one of our five children who was able to make it with us.

Chairman HATCH. Jenny.

Mr. CAMPBELL. We also have with us today Chief Judge Stephen M. McNamee, of the United States District Court for the District of Arizona.

Chairman HATCH. We are honored to have you here, Judge.

Mr. CAMPBELL. We appreciate having him here.

[The biographical information of Mr. Campbell follows:]